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Augenstein, Daniel; Dawson, Mark; Thielbörger, Pierre

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**The UNGPs in the European Union: The Open Coordination  
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## *The UNGPs in the European Union: The Open Coordination of Business and Human Rights?*

Daniel AUGENSTEIN, Associate Professor, Department European and International Public Law, Tilburg Law School contact: [d.h.augenstein@tilburguniversity.edu](mailto:d.h.augenstein@tilburguniversity.edu);

Mark DAWSON, Professor of European Law and Governance, Hertie School of Governance, contact: [dawson@hertie-school.org](mailto:dawson@hertie-school.org);

and

Pierre THIELBÖRGER, Professor for German Public Law and International Law, Institute for International Law of Peace and Armed Conflict and Law Faculty, Ruhr University Bochum, contact: [pierre.thielboerger@rub.de](mailto:pierre.thielboerger@rub.de).

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## *The UNGPs in the European Union: The Open Coordination of Business and Human Rights?*

### **Abstract**

*The article examines the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) in the European Union via National Action Plans (NAPs). We argue that some of the shortcomings currently observed in the implementation process could effectively be addressed through the Open Method of Coordination – a governance instrument already used by the EU in other policy domains. The article sketches out the polycentric global governance approach envisaged by the UNGPs and discusses the institutional and policy background of their implementation in the EU. It provides an assessment of EU member states' NAPs on business and human rights, as benchmarked against international NAP guidance, before relating experiences with the existing NAP process to the policy background and rationale of the OMC and considering the conditions for employing the OMC in the business and human rights domain. Building on a recent opinion of the EU Fundamental Rights Agency, the article concludes with a concrete proposal for developing an OMC on business and human rights in the European Union.*

In June 2016 the Council of the European Union (EU) published its 'Conclusions on Business and Human Rights',<sup>1</sup> marking the 5<sup>th</sup> anniversary of the endorsement of the United Nations Guiding Principles on Business and Human Rights (UNGPs) by the United Nations (UN) Human Rights Council.<sup>2</sup> The UNGPs are the first universally accepted global framework on business and human rights, developed by Professor John Ruggie in his capacity as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business entities (SRSG).<sup>3</sup> The UNGPs consist of three pillars that build on the SRSG's 'Protect, Respect and Remedy' Framework: (i) the state duty to protect human rights against violations by third parties, including corporations; (ii) the corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing the rights of others; and (iii) greater access to effective remedies, both judicial and non-judicial, for victims of corporate human rights abuse. Following the end of the SRSG's mandate in 2011, a UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Entities was established to promote the 'effective and comprehensive

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<sup>1</sup> Council of the EU, 'Council Conclusions on Business and Human Rights', 3477<sup>th</sup> meeting of the Foreign Affairs Council, 10254/16 (20 June 2016).

<sup>2</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

<sup>3</sup> For a more detailed account of the evolution of the UNGPs, see Pierre Thielbörger and Tobias Ackermann, 'A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?' (2017) 24:1 *Indiana Journal of Global Legal Studies*, 43, 46–53.

dissemination and implementation' of the UNGPs.<sup>4</sup> The Working Group has *inter alia* encouraged states and other relevant stakeholders to develop National Action Plans (NAPs) on business and human rights.<sup>5</sup> NAPs are policy documents in which states outline strategies and instruments to comply with their duty to prevent and redress corporate-related human rights abuse, as laid down in international human rights law and restated in the first and the third pillar of the UNGPs.

Reiterating the European Union's support of the UN Guiding Principles, the 2016 Council Conclusions on Business and Human Rights welcome the European Commission's intention to develop an EU Action Plan on Responsible Business Conduct that should outline an overall European policy framework to enhance the further implementation of the UNGPs.<sup>6</sup> The Council notes in its Conclusions that 'EU Member States have taken the lead internationally on developing and adopting National Action Plans to implement the Guiding Principles or integrating [them] into national [Corporate Social Responsibility (CSR)] Strategies'. In this regard, it encourages the European Commission and the European External Action Service 'to promote peer learning on business and human rights, including cross-regional peer learning'.<sup>7</sup> Already in 2011, the European Commission had adopted a new strategy for corporate social responsibility in line with the second pillar of the UNGPs.<sup>8</sup> To comply with their duty to protect (first pillar of the UNGPs), EU member states were tasked to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles. This request was reiterated in the Council of the European Union's 2012 and 2015 Action Plans on

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<sup>4</sup> Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Entities', A/HRC/RES/17/4 (6 July 2011).

<sup>5</sup> UN Secretary-General, 'Report of the Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises', A/69/263 (6 August 2014).

<sup>6</sup> See Council of the EU, note 1, para 6.

<sup>7</sup> Ibid, para 5. A peer review process was already established to promote the development of NAPs on CSR, which led to the publication of a CSR Compendium in 2014, see European Commission, *Corporate Social Responsibility: National Public Policies in the European Union: Compendium 2014* (Luxembourg: EU, 2014). The European Commission has furthermore organized pilot peer reviews on business and human rights in seven EU member states. The reports are available at the European Commission's webpage, see <http://ec.europa.eu/social/keyDocuments.jsp?advSearchKey=CSRprreport&mode=advancedSubmit&langId=en&policyArea=&type=0&country=0&year=0> (accessed 13 April 2017).

<sup>8</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011).

Human Rights and Democracy, with the deadline for member state NAPs being extended to 2017.<sup>9</sup> Following the Commission's initiative, a number of member states developed National Action Plans prior to the UN Working Group publishing its official NAP guidance in December 2014.<sup>10</sup> At present, eight EU member states have released NAPs on business and human rights (the United Kingdom, the Netherlands, Denmark, Finland, Lithuania, Sweden, Italy and Germany) and eight further member states have produced drafts or have initiated a NAP process (the Czech Republic, France, Greece, Ireland, Latvia, Portugal, Slovenia, and Spain).<sup>11</sup> The majority of member states have furthermore published NAPs on CSR that also refer to human rights.<sup>12</sup> In terms of quantity if not quality, this makes the European Union a global leader in developing NAPs on business and human rights.

The article examines the implementation of the UN Guiding Principles on Business and Human Rights in the European Union via National Action Plans. We argue that some of the shortcomings currently observed in the implementation process could effectively be addressed through the Open Method of Coordination (OMC) – a governance instrument that the EU has already successfully used in other policy domains such as employment, social protection and education. The use of the OMC was recommended in an Opinion of the EU Fundamental Rights Agency (FRA) published on 10 April 2017, providing a further reason to scientifically explore its potential and feasibility in the business and human rights domain.<sup>13</sup> According to FRA, 'the development of an OMC in the area of business and human rights allows for

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<sup>9</sup> Council of the EU, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12 (25 June 2012); Council of the EU, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019', 10897/15 (20 July 2015).

<sup>10</sup> UN Working Group on Business and Human Rights (UNWG), 'Guidance on National Action Plans on Business and Human Rights' (December 2014), [http://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf) (accessed 13 April 2017); revised versions of the Guidance were published in November 2015 and November 2016.

<sup>11</sup> Within the EU, Scotland will develop its own NAP. Of the European countries without EU membership, Norway published its NAP in 2015 and Switzerland in December 2016. For a global overview, see Business & Human Rights Resource Centre, 'National Action Plans', <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (accessed 13 April 2017).

<sup>12</sup> See European Commission, note 7.

<sup>13</sup> EU Fundamental Rights Agency, 'Improving Access to Remedy in the Area of Business and Human Rights at the EU Level', FRA Opinion 1/2017 (10 April 2017).

potential to create among EU member states a common understanding of the problems and challenges in implementing the UN Guiding Principles, as well as to build consensus on their practical implementation.’<sup>14</sup>

The article will explore this claim in three main steps. Section two provides an assessment of existing EU member state National Action Plans on business and human rights, as benchmarked against international NAP guidance. Section three relates the discussion of EU member state NAPs to the policy background and rationale of the Open Method of Coordination. On the one hand, the EU’s experience with open coordination offers valuable lessons for a successful implementation of the UNGPs on a global scale. On the other hand, developing an OMC on business and human rights within the European Union can contribute to enhancing the quality of member states’ National Action Plans. Against this background, section four makes some more concrete proposals for developing a European OMC on business and human rights – a possibility already considered by the EU Fundamental Rights Agency, albeit in rather general terms.

## I. IMPLEMENTING THE UNGPS IN THE EUROPEAN UNION

### A. International Guidance on Implementing the UNGPs via National Action Plans

The two most important international guidelines assisting states in the development, implementation and review of NAPs are the Guidance on National Action Plans on Business and Human Rights developed by the UN Working Group on Business and Human Rights (UNWG Guidance);<sup>15</sup> and a Toolkit on National Action Plans on Business and Human Rights published by the Danish Institute for Human Rights in collaboration with the International Corporate Accountability Roundtable (DIHR/ICAR Guidance).<sup>16</sup> Drawing on extensive multi-stakeholder consultations and previous experiences with

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<sup>14</sup> Ibid, 66–7

<sup>15</sup> See UNWG, note 10.

<sup>16</sup> Danish Institute for Human Rights (DIHR) and International Corporate Accountability Roundtable (ICAR), ‘National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks’ (June 2014), <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5865d59fe6f2e17f4f0cb629/1483068841826/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf> (accessed 13 April 2017).

developing NAPs, both guidelines flesh out the procedural and substantive requirements for an effective implementation of the UNGPs.

National Action Plans on business and human rights should pursue three overarching objectives: taking stock of existing state measures that contribute to the implementation of the UNGPs; identifying gaps in states' legal and policy framework that require further action; and outlining strategies to close protection gaps and to otherwise prevent and redress corporate-related human rights abuse. In this regard, the UNWG Guidance emphasizes four criteria essential for a NAP to be effective. First, NAPs must be based on the UNGPs, incorporate all three pillars and be informed by core human rights principles such as non-discrimination and equality. Second, NAPs must respond to challenges in the national context and reflect country-specific priorities or particularly important sectors within the national economy. Third, they must be developed and implemented through an inclusive and transparent process, taking the views and needs of affected parties and relevant (governmental and non-governmental) actors into account. Fourth, NAPs must be regularly reviewed to ensure continuous progress in enhancing human rights protection and effective responses to changing conditions in the regulatory environment.<sup>17</sup>

The UNWG and DIHR/ICAR Guidance contain more detailed process- and content-based criteria for developing and implementing a NAP. Both documents recommend that states make a formal commitment to engage in a NAP process, including publication of the terms of reference and a timeline. States should furthermore establish a format for inter-ministerial and cross-departmental collaboration, develop and publish a work plan and make adequate resources available.<sup>18</sup> Stakeholder participation in line with a rights-based approach is critical for a successful development of a NAP. States should conduct and publish a stakeholder mapping to ensure the equal inclusion of all affected parties. Meaningful and effective participation should be facilitated through capacity building and providing all stakeholders with adequate and timely information. Stakeholders should participate in the identification of national priority areas and

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<sup>17</sup> UNWG, note 10, 3–5.

<sup>18</sup> Ibid, 5–6; DIHR and ICAR, note 14, 41–2.



implementation gaps, as well as in the development of new instruments to enhance human rights protection against corporate abuse.<sup>19</sup>

In preparation of drafting a NAP, a national baseline assessment should be conducted by a competent independent body (external research institutes, NHRIs, etc.) that maps out the current state of implementation of the UNGPs. The draft NAP should be widely disseminated and discussed with all relevant stakeholders prior to being finalized and officially launched.<sup>20</sup> A NAP should contain a 'smart mix' of mandatory and voluntary, and national and international measures,<sup>21</sup> and 'extend to all matters in the state's jurisdiction, including matters outside the state's territorial jurisdiction'.<sup>22</sup> NAPs should outline actions to implement the UNGPs that are specific, measurable, achievable, relevant and time-specific (SMART).<sup>23</sup> They should also lay down a framework for monitoring and reporting, based on a clear allocation of responsibility and accountability for implementation. All relevant ministries and government departments should collaborate in the implementation process, supported by a multi-stakeholder group and other institutions including NHRIs.<sup>24</sup> Finally, NAPs should be regularly reviewed, evaluated and updated in order to identify successes and failures, remedy shortcomings, and share information and best practices within and between governments.<sup>25</sup>

## **B. Overall Assessment of EU Member State NAPs**

While, as noted above, the EU member states have played a pioneering role in the early development of National Action Plans on business and human rights, their NAPs have at the same time been frequently criticized for shortcomings in process and content. A 2014 assessment of the United Kingdom (UK), Dutch, Danish and Finnish NAPs conducted by ICAR and the European Coalition for Corporate Justice (ECCJ) suggests

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<sup>19</sup> UNWG, note 10, 7–8; DIHR and ICAR, note 14, 43–4.

<sup>20</sup> UNWG, note 10, 9; DIHR and ICAR, note 14, 44–5.

<sup>21</sup> UNWG, note 10, 13.

<sup>22</sup> DIHR and ICAR, note 14, 45.

<sup>23</sup> Ibid, 46.

<sup>24</sup> UNWG, note 10, 9–10; DIHR and ICAR, note 14, 47.

<sup>25</sup> UNWG, note 10, 10; DIHR and ICAR, note 14, 49.

that while states have involved various entities within and outside government in the drafting process, the mapping of relevant stakeholders and existing protection gaps, as well as the quality of consultations, leave much to be desired. In terms of content, while all four NAPS scrutinized by ICAR and ECCJ made an explicit commitment to the UNGPs, they focus heavily on past actions and soft/voluntary measures (such as awareness raising or training) at the expense of exploring forward-looking and regulatory options. Commitments to future action tend to remain vague, lacking sufficient information about concrete steps to be taken and the agencies responsible for implementation.<sup>26</sup>

In a similar vein, the European Network of National Human Rights Institutions (ENNHRI) has criticized procedural and substantive shortcomings in the development of EU member state NAPS:

Ongoing NAP processes in some Member States are neither participatory nor transparent, with stakeholders involved weakly or not at all, and civil society organizations in particular frequently lacking even basic information or opportunities to engage in dialogue with government representatives. Member States' published NAPs to date mostly describe historical actions, and lack specific commitments capable of demonstrably improving UNGPs implementation at national level.<sup>27</sup>

Noting that 'such weaknesses undermine NAP's contribution to respect for human rights, good governance and accountability both in the EU and abroad', ENNHRI has called upon the European Commission to better guide member states through the NAP process and to establish a 'human rights-based, participatory, transparent multi-stakeholder NAP review process at EU level'.<sup>28</sup> These critical assessments have been largely confirmed by later studies that draw on a broader sample of EU member state

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<sup>26</sup> ICAR and European Coalition for Corporate Justice (ECCJ), 'Assessments of Existing National Action Plans (NAPs) on Business and Human Rights' (November 2015), 3–5, <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58d2bdb63a0411eedc66af79/1490206143625/ICAR-ECCJ-Assessments-of-Existing-NAPs-2015-Update.pdf> (accessed 13 April 2017).

<sup>27</sup> European Network of National Human Rights Institutions (ENNHRI), 'Recommendations for the next EU Strategy on CSR' (April 2015), 2, [https://business-humanrights.org/sites/default/files/documents/EU%20CSR%20Communication%20ENNHRI%20Final%20Apr%202015%20\(2\).pdf](https://business-humanrights.org/sites/default/files/documents/EU%20CSR%20Communication%20ENNHRI%20Final%20Apr%202015%20(2).pdf) (accessed 13 April 2017).

<sup>28</sup> Ibid, 2–3. In a similar vein, the Committee of Ministers of the Council of Europe has called upon states to 'share plans on the national implementation of the [UNGPs], including revised National Action Plans and best practice concerning [their] development ...'; see Council of Europe, 'Recommendation on human rights and business', CM/Rec(2016)3 (2 March 2016), para 4.

NAPs.<sup>29</sup> Based on the authors' own analysis of existing EU member state NAPs, three main procedural and substantive shortcomings risk undermining an effective implementation of the UNGPs in the European Union: a failure to use indicators and benchmarks to measure success; inadequate provision for monitoring, review and follow-up; and a misalignment of the three pillars, leading to a failure to adopt a smart regulatory mix of voluntary and mandatory instruments.

### C. Insufficient Use of Indicators and Benchmarks

For states to design SMART actions implementing the UNGPs, the effects of the employed instruments have to be 'measurable'.<sup>30</sup> Classical tools of measuring effectiveness of public policies are indicators and benchmarks.<sup>31</sup> Indicators are parameters that assess whether and to what extent (the laws and policies envisaged in) the NAPs have proven suitable to contribute to an effective implementation of the UNGPs; benchmarks are quantifiable targets that states set themselves to achieve. Possible indicators and benchmarks that could be used are various, ranging from the number of corporations of a certain size having adopted a human rights due diligence mechanism (as defined in the second pillar of the UNGPs) to the amount of (public and private) funding being dedicated to the implementation process.

The current NAPs often fail to specify quantitative or qualitative indicators, and rarely set concrete benchmarks to be achieved. One exception is found in the German NAP that sets a benchmark of 50 per cent of German companies with more than 500

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<sup>29</sup> European Parliament, 'Study: Implementation of the UN Guiding Principles on Business and Human Rights' (2017), 39–42, [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO\\_STU\(2017\)578031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf) (accessed 13 April 2017).

<sup>30</sup> According to the ICAR/ECCJ Guidance, SMART actions are those that are 'specific, measurable, achievable, relevant and time-specific'. ICAR and ECCJ, note 26, 46.

<sup>31</sup> The UNWG recommends that in developing NAPs, 'Governments should adopt an evidence-based approach, gathering data and assessing what may be required to align existing laws, regulation and policies with the Guiding Principles'. In particular, governments should consider 'attaching clear objectives, time frames and indicators to guide the implementation of the various measures.' UN General Assembly, 'Human rights and transnational corporations and other business enterprises: Note by the Secretary-General', A/69/263 (5 August 2014), paras 20, 73.

employees to have incorporated human rights due diligence by 2020.<sup>32</sup> If the 50 per cent target is missed, the German government will consider (*prüfen*) further (legislative) steps.<sup>33</sup> The Dutch, Danish and Italian NAPs include a list of forward-looking ‘action points’ aligned with the UNGPs, yet without sufficiently circumscribed indicators, benchmarks or a clearly defined time-frame.<sup>34</sup>

The Dutch NAP at least contains a ‘transparency benchmark’ with which the government aims to encourage corporate human rights reporting.<sup>35</sup> Other EU member state NAPs offer suitable entry points that could be developed into indicators and benchmarks in the future. The Swedish NAP, for instance, encourages companies to create grievance and redress mechanisms (e.g., ombudsmen mechanisms), but falls short of setting a concrete benchmark.<sup>36</sup> The Lithuanian NAP promises to offer awards for responsible businesses and best anti-corruption practices, without, however, quantifying or measuring these efforts.<sup>37</sup> The Finnish NAP considers that new funding

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<sup>32</sup> German Government, ‘Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020’ (21 December 2016), 12, <http://www.auswaertiges-amt.de/cae/servlet/contentblob/754690/publicationFile/222786/161221-NAP-DL.pdf> (accessed 13 April 2017).

<sup>33</sup> Ibid. While observers have welcomed this target, critique has been voiced concerning the unassertive nature of the government’s response should the target be missed, rendering the benchmark a toothless tiger; see Deutsches Institut für Menschenrechte, ‘Stellungnahme: “Zögerliche Umsetzung”: Der politische Wille reicht nicht weiter: Deutschland setzt die VN-Leitprinzipien um – mit kleinen Schritten’ (21 December 2016), [http://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/Publikationen/Stellungnahmen/Stellungnahme\\_Verabschiedung\\_NAP\\_Wirtschaft\\_und\\_Menschenrechte.pdf](http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Stellungnahme_Verabschiedung_NAP_Wirtschaft_und_Menschenrechte.pdf) (accessed 13 April 2017).

<sup>34</sup> Dutch Ministry of Foreign Affairs, ‘National Action Plan on Business and Human Rights’ (April 2014), <https://www.rijksoverheid.nl/documenten/publicaties/2014/01/30/national-action-plan-on-business-and-human-rights> (accessed 13 April 2017); Danish Government, ‘Danish National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights’ (March 2014), [http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark\\_NationalPlanBHR.pdf](http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf) (accessed 13 April 2017); Italian Government, ‘Italian National Action Plan on Business and Human Rights 2016-2021’ (1 December 2016), [http://www.cidu.esteri.it/resource/2016/07/48254\\_f\\_NAPBHRENGOpenConsultation.pdf](http://www.cidu.esteri.it/resource/2016/07/48254_f_NAPBHRENGOpenConsultation.pdf) (accessed 13 April 2017).

<sup>35</sup> ‘The Netherlands pursues an active policy of encouraging social reporting through the transparency benchmark. This benchmark is carried out every year on the instructions of the Ministry of Economic Affairs to give the 500 largest Dutch companies a rating for transparency on sustainability and CSR.’ Dutch Ministry of Foreign Affairs, note 34, 29.

<sup>36</sup> Government Offices of Sweden, ‘Action Plan for Business and Human Rights’ (August 2015), 17, <http://www.government.se/4a84f5/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf> (accessed 13 April 2017).

<sup>37</sup> Government of the Republic of Lithuania, ‘Lithuania’s Action Plan on the Implementation of the United Nations Guiding Principles on Business and Human Rights’ (March 2015), 7, [https://www.urm.lt/uploads/default/documents/uzienio\\_politika/zmogaus\\_teises/zmogaus\\_teises\\_EN/14\\_EN.pdf](https://www.urm.lt/uploads/default/documents/uzienio_politika/zmogaus_teises/zmogaus_teises_EN/14_EN.pdf) (accessed 13 April 2017).

lines to support the UNGPs could ‘possibly’ be made available but fails to indicate any concrete time commitment or target as to the intended amount.<sup>38</sup> A commitment to hold roundtable meetings with all relevant stakeholders on a sector-by-sector basis remains similarly vague.<sup>39</sup> The German NAP lists a number of measures suitable for the use of indicators and benchmarks, including corporations’ establishment of internal and external complaint procedures, or the introduction of a seal of approval (*‘Gewährleistungsmarke’*) for commodities whose production process explicitly adheres to human rights standards.<sup>40</sup>

Recent studies on the suitability of indicators and benchmarks in assessing business-related human rights impacts provide a solid basis for including such indicators and benchmarks into the NAPs.<sup>41</sup> This would render the envisaged actions more measurable and the implementing institutions more accountable for goals they have set-out. While some EU member states have already conducted comparative studies in areas of law and policy relevant to business and human rights,<sup>42</sup> a set of agreed indicators and benchmarks would also facilitate cross-country comparison and could contribute to enhancing policy coherence at the European level (as supported in the recent FRA opinion).<sup>43</sup>

#### **D. Inadequate provision for monitoring, review and follow-up**

The provisions in EU member state NAPs concerning monitoring and follow-up are similarly weak or incomplete. Commonly, the lack of concrete commitments goes hand

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<sup>38</sup> Finnish Ministry of Employment and the Economy, ‘National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights’ (October 2014), 29, <https://tem.fi/documents/1410877/3437254/National+Action+Plan+for+the+implementation+of+the+UN+guiding+principles+21102014.pdf> (accessed 13 April 2017).

<sup>39</sup> See *ibid.*, 26.

<sup>40</sup> See German Government, note 32, 9–11, 30.

<sup>41</sup> Dylan Tromp, ‘Assessing Business Related Impacts on Human Rights: Indicators and Benchmark in Standards and Practice’, INEF-Report 110/2016 (December 2016), <https://inef.uni-due.de/cms/files/report110.pdf> (accessed 13 April 2017).

<sup>42</sup> The Dutch government has recently published a comparative study on duties of care of Dutch business enterprises with respect to international CSR; see Liesbeth Enneking et al, ‘Zorgplichten van Nederlands ondernemingen insake internationaal maatschappelijk verantwoord ondernemen’ (December 2015), <https://www.rijksoverheid.nl/documenten/rapporten/2016/04/21/zorgplichten-van-nederlandse-ondernemingen-inzake-internationaal-maatschappelijk-verantwoord-ondernemen> (accessed 13 April 2017).

<sup>43</sup> See EU Fundamental Rights Agency, note 13, 65.

in hand with a failure to specify the institution responsible and accountable for monitoring and updating the NAP. With regard to monitoring, the Finnish NAP provides for yearly monitoring by the Finnish Committee on Corporate Social Responsibility.<sup>44</sup> The Danish NAP promises, albeit vaguely, to ‘continuously update Danish priorities with regard to the implementation of the UNGPs’ in alignment with its National Action Plan on CSR.<sup>45</sup> The German NAP announces a yearly evaluation of the implementation process and assigns this task to a new specific inter-ministerial institution, supported by the (already existing and slightly enlarged) German CSR-forum.<sup>46</sup> However, monitoring is made conditional upon budgetary permission.<sup>47</sup> Moreover, NGOs have expressed concerns about the composition of the enlarged CSR forum, fearing an overrepresentation of business interests and an undue focus on voluntary as opposed to mandatory measures.<sup>48</sup> The Italian NAP that runs from 2016 to 2021 shall be ‘periodically monitored through an ongoing process of analysis of its implementation and consultation with all social partners and relevant stakeholders’.<sup>49</sup> The NAP designates the Inter-ministerial Committee for Human Rights at the Ministry of Foreign Affairs and International Cooperation as the responsible entity for monitoring the implementation of the NAP. A ‘mid-term review’ is envisaged for 2018.<sup>50</sup>

In the Netherlands, a NAP update is on its way. The Netherlands Institute for Human Rights has urged the Dutch Government to provide more specific information about the follow-up measures it intends to take:

The Institute notes that the action plan contains no concrete information about the follow-up. It is not indicated in the plan when the plan will start, which period it exactly covers and when there will be feedback about the various measures taken. It is also not indicated when the

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<sup>44</sup> See Finnish Ministry of Employment and the Economy, note 38, 32.

<sup>45</sup> See Dutch Ministry of Foreign Affairs, note 34, 22.

<sup>46</sup> See German Government, note 32, 33, 40–1 (*‘interministerieller Ausschuss’*).

<sup>47</sup> Ibid, 40.

<sup>48</sup> Corporate Accountability (CorA), Forum Menschenrechte and Verband Entwicklungspolitik und Humanitäre Hilfe (VENRO), ‘No Courage to Commit: Comments of German non-governmental organisations on the German government’s National Action Plan on Business and Human Rights’ (6 February 2017), 14–15.

<sup>49</sup> See Italian Government, note 34, 29.

<sup>50</sup> Ibid.



various measures will be completed and when an update version of the action plan may be expected.<sup>51</sup>

The Swedish NAP indicates that there could be a review in 2017 without using mandatory language or circumscribing the scope of such a review.<sup>52</sup> While neither the German nor the Italian NAP explicitly commit to an update,<sup>53</sup> both NAPs are time-limited so that an update can be expected by 2020 (Germany) and 2021 (Italy) at the latest.

The United Kingdom is currently the only country to have published an updated version of its NAP, honouring a commitment made in its 2013 National Action Plan. The update serves mainly to record government achievements since the publication of the initial NAP in 2013 and to reflect more recent international developments, including guidance on implementation and the experience of other countries.<sup>54</sup> While the UK update itself does not add much to the original NAP in terms of forward-looking actions, the UK Joint Committee on Human Rights has launched an (ongoing) inquiry into human rights and business that scrutinizes the steps the government takes to monitor compliance with the UNGPs; to clarify how far the government is able to enforce the UNGPs; to review progress British business has made in carrying out its responsibility to respect human rights; and to verify whether victims of human rights abuse involving business enterprises within UK jurisdiction have access to effective remedies.<sup>55</sup> Notably, while the 2016 version of the NAP reaffirms the government's previous commitment to report each year on implementation progress, it does not contain any information or commitment on a future NAP update.<sup>56</sup> Nevertheless, the UK example points to the importance of regularly reviewing and updating NAPs, under the scrutiny of

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<sup>51</sup> Netherlands Institute for Human Rights, 'Advice: Response to the National Action Plan on Business and Human Rights "Knowing and Showing"' (February 2014), 13, <https://business-humanrights.org/sites/default/files/documents/netherlands-nhri-re-national-action-plan.pdf> (accessed 13 April 2017).

<sup>52</sup> See Government Offices of Sweden, note 36, 19.

<sup>53</sup> The German NAP merely envisages a 'status report' in preparation of a future review of the NAP. German Government, note 32, 41.

<sup>54</sup> UK Government, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights, Updated May 2016' (May 2016), 2, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522805/Good\\_Business\\_Implementing\\_the\\_UN\\_Guiding\\_Principles\\_on\\_Business\\_and\\_Human\\_Rights\\_updated\\_May\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf) (accessed 13 April 2017).

<sup>55</sup> See UK Parliament, 'Human Rights and Business Inquiry', <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/inquiry/> (accessed 13 April 2017).

<sup>56</sup> See UK Government, note 54, 24.

parliamentary bodies sufficiently independent from government.<sup>57</sup> A regular review and update process is indispensable to adapt NAPs to a changing international regulatory and economic environment. Identifying responsible institutions and setting binding timeframes for review contributes to holding states to account for failures to deliver on their commitments.

### **E. Insufficient alignment of the pillars, coupled with a failure to adopt a smart regulatory mix**

An effective implementation of the UNGPs requires that the three pillars of the 'protect, respect and remedy' framework are treated as a complementary whole, with each pillar supporting the others in achieving sustainable progress. Yet existing EU Member NAPs cover the three pillars unevenly, with little attention given in particular to remediation (pillar three).<sup>58</sup> Moreover, many NAPs focus on pillar two at the expense of exploring the full scope of the state duty to protect against corporate human rights abuse. One consequence is that, as in the case of the Danish NAP, measures relating to pillar two appear reminiscent of the old 'voluntary' approach to CSR in that they heavily rely on corporate self-regulation and access to non-judicial remedies.<sup>59</sup> Relatedly, the NAPs fail to make sufficient use of mandatory instruments, with state actions listed under pillar one mainly confined to 'soft' measures such as state guidance, awareness raising, and training initiatives.<sup>60</sup> While important, such measures are not suitable to address well-documented protection gaps in the legal framework governing business and human rights, particularly in the area of access to justice and effective remedies.<sup>61</sup>

The insufficient alignment of the three pillars translates into a failure of the NAPs to adopt a 'smart mix' of voluntary and mandatory instruments that would allow states to

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<sup>57</sup> See UNWG, note 10, 9–10.

<sup>58</sup> See ICAR and ECCJ, note 26, 4.

<sup>59</sup> See Danish Government, note 34, 17–18.

<sup>60</sup> See ICAR and ECCJ, note 26, 4.

<sup>61</sup> See Human Rights Council, 'Improving accountability and access to remedy for victims of business-related human rights abuse', A/HRC/32/19 (10 May 2016), para 5. See further Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (December 2013), <https://icar.squarespace.com/s/The-Third-Pillar-FINAL1.pdf> (accessed 13 April 2017); EU Fundamental Rights Agency, note 13.



use their political and financial leverage in incentivising or compelling corporations to respect human rights. The NAPs' approach to human rights due diligence – the heart of pillar two – is a good example. Human rights due diligence is not only relevant in relation to the corporate responsibility to respect in that it enables businesses to manage stakeholder-related risk. Incentivising or requiring human rights due diligence is equally a means for states to comply with their duty to protect human rights.<sup>62</sup> The EU member state NAPs fail to sufficiently operationalize this mutually reinforcing relationship between pillars one and two. The Dutch government, for example, commits to taking a more proactive role in implementing the UNGPs and to analysing its current regulatory mix as applied to human rights due diligence. However, the Dutch NAP largely confines itself to listing supportive government actions (such as awareness raising and capacity building) and does not provide for legislative and enforcement measures. As concerns the latter, the NAP concludes that consultations have 'failed to produce consensus on whether the obligations of Dutch companies in relation to CSR are adequately regulated by law'.<sup>63</sup> The prevalence of voluntary instruments and an uneven implementation of regulatory measures across the European Union are not only detrimental to an effective global implementation of the UNGPs but also risk undermining a coherent European approach to business and human rights.<sup>64</sup>

The preparation of the German NAP, previously expected to set a very ambitious standard,<sup>65</sup> offers an example of how achieving a smart regulatory mix through a proper alignment of the three pillars can be jeopardized during the drafting process. A 2013 scoping study for the German Ministry of Labour and Social Affairs had highlighted the importance of the state duty to protect in ensuring and monitoring corporate human

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<sup>62</sup> John Gerard Ruggie, 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization', Harvard Kennedy School, Mossavar-Rahmani Center for Business and Government, Regulatory Policy Program Working Paper RPP-2015-04 (2015), 4, [https://www.hks.harvard.edu/content/download/74031/1678736/version/1/file/RPP\\_2015\\_04\\_Ruggie.pdf](https://www.hks.harvard.edu/content/download/74031/1678736/version/1/file/RPP_2015_04_Ruggie.pdf) (accessed 13 April 2017).

<sup>63</sup> See Dutch Ministry of Foreign Affairs, note 34, 28, 41. Considering access to justice, the Netherlands Institute for Human Rights has urged the Dutch government 'to remove the procedural inequality between victims of human rights violations and companies who violate human rights.' Netherlands Institute for Human Rights, note 51, 2.

<sup>64</sup> Maddalena Neglia, 'The UNGPs – Five Years On: From Consensus to Divergence in Public Regulation on Business and Human Rights' (2016) 34:4 *Netherlands Quarterly of Human Rights* 289.

<sup>65</sup> See Deutsches Institut für Menschenrechte, note 33, 10.

rights due diligence.<sup>66</sup> The later multi-stakeholder consultations in preparation of the NAP were conducted under the auspices of the Ministry of Foreign Affairs and received considerable praise.<sup>67</sup> The results of the consultations, however, did not properly translate into the final NAP.<sup>68</sup> In July 2016, the Ministry of Finance – not previously involved in the process – requested significant last-minute revisions of the draft NAP, allegedly under pressure from corporate lobbying.<sup>69</sup> These revisions would have omitted any reference to legislative instruments requiring human rights due diligence. Proposals to elaborate corporate due diligence obligations through best-practice examples and guidelines were branded as ‘sweeping’ and ‘arbitrary’. The entire chapter on monitoring would have been removed. The final NAP published in December 2016 is an awkward compromise that, while in some ways paving new ground, is in many parts noncommittal and dominated by concerns of creating a ‘global level playing field’ for German corporations.<sup>70</sup>

## II. IMPROVING THE IMPLEMENTATION OF THE UNGPs VIA NAPs:

### LESSONS FROM THE OMC

#### A. The Concept of the Open Method of Coordination

The existing experience with NAP development in the EU member states displays significant shortcomings. To what extent – in line with its business and human rights strategy – could the EU play a role in addressing some of these failings? One can build a more complete picture of the strengths and limitations of the existing NAP process by

<sup>66</sup> Jutta Knopf et al., ‘Unternehmensverantwortung für Menschenrechte: Ableitung von Handlungsempfehlungen auf der Basis von Experteninterviews und internationalen Fallstudien’ (Februar 2013), <https://www.adelphi.de/de/publikation/unternehmensverantwortung-f%C3%BCr-menschenrechte> (accessed 13 April 2017).

<sup>67</sup> See European Parliament, note 29, 41.

<sup>68</sup> Several NGOs have expressed concerns that while having been involved in the early development of the NAP, they were largely excluded from the drafting process over the last months prior to its release; see CorA, Forum Menschenrechte and VENRO, note 48, 4; ‘Aktionsplan für Menschenrechte: “Ein Weckruf auch für die deutsche Wirtschaft”’, *Deutschlandfunk* (21 December 2016), [http://www.deutschlandfunk.de/aktionsplan-fuer-menschenrechte-ein-weckruf-auch-fuer-die.694.de.html?dram:article\\_id=374462](http://www.deutschlandfunk.de/aktionsplan-fuer-menschenrechte-ein-weckruf-auch-fuer-die.694.de.html?dram:article_id=374462) (accessed 13 April 2017).

<sup>69</sup> See Christin Gottler and Andreas Maus, ‘Lobbyismus auf Regierungsebene: Profit statt Menschenrechte’, *Monitor* (8 September 2016), <http://www1.wdr.de/daserste/monitor/sendungen/lobbyismus-104.html> (accessed 13 April 2017).

<sup>70</sup> See German Government, note 32. The German Institute for Human Rights described the final NAP as evincing ‘a lack of political will to advance the UNGPs.’ Deutsches Institut für Menschenrechte, note 33.

engaging with the history of other forms of trans-national policy coordination. A prime example in this regard is the Open Method of Coordination (OMC) – a process for multi-lateral surveillance introduced to coordinate EU social policies in the late 90's.<sup>71</sup> Since that period, the method has spread to a number of further policy areas, from education to culture, health, fiscal policy and beyond. While one of the characteristic features of the OMC is the lack of any one single procedural model applicable to all fields, the core of the method was elaborated by the Lisbon European Council in 2000. Most OMC processes thus contain some elements of the following four features (some of which mirror the design of the UNGP NAP process):

- Fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;
- Establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
- Translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- Periodic monitoring, evaluation and peer review organised as mutual learning processes.<sup>72</sup>

Understanding the usefulness of the Open Method of Coordination for implementing the UNGPs *via* National Action Plans requires understanding the rationale for the OMC's creation. At its core is a tension between diversity and interdependence. For the EU of the late 1990s and early 2000s, interdependence meant the increasing realization that in a common currency Union, fiscal and social policies were likely to have severe spill-over effects between states (potentially capable of de-stabilising the Union itself). Accompanying this was the realization that in an integrated economic area, joined action was needed to avoid a 'race to the bottom' in elaborating social standards.<sup>73</sup> Attempts of individual member states to enhance social protection could negatively affect their national economic competitiveness in a common (internal) European market

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<sup>71</sup> On the history of the OMC, see Mark Dawson, *New Governance and the Transformation of European Law* (Cambridge: Cambridge University Press, 2011) 24–68. On its more recent evolution, see Egidijus Barcevičius, J. Timo Weishaupt and Jonathan Zeitlin, 'Tracing the Social OMC from its Origins to Europe 2020', in Egidijus Barcevičius, J. Timo Weishaupt and Jonathan Zeitlin (eds.), *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination* (Houndmills, Basingstoke, Hampshire: Palgrave MacMillan, 2014) 16.

<sup>72</sup> European Council, 'Lisbon European Council 23 and 24 March 2000: Presidency Conclusions' (2000), para 37, [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm) (accessed 13 April 2017).

<sup>73</sup> See Fritz W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 *Journal of Common Market Studies* 4.

as such attempts may incentivise companies to relocate to member states with lower protection standards. In this sense, social policy became an area of 'common' European concern in which solutions to social and economic problems had to be sought collectively.

The diversity concern was that extensive EU intervention in areas such as budgetary and social policy was legally, politically and functionally infeasible.<sup>74</sup> Legally, the EU carried unclear competences in these domains under the European Treaties.<sup>75</sup> Politically, member states were unwilling to transfer more control to an unloved Brussels machinery. Meanwhile, functionally, any attempt at harmonising national rules would likely flounder given the obvious diversity between the social and fiscal regimes of the member states. Open Coordination was the perfect solution to this dilemma.<sup>76</sup> It promised coordinated EU action, guided by common principles and goals, but EU action that respected 'legitimate diversity' between different national legal and social orders.<sup>77</sup> It also promised a more responsive form of EU regulation, where member states could shift and change their policy priorities according to new developments, and experiment with and learn from the practices of their neighbours.<sup>78</sup> The outcome – a process of national plans based on EU goals, with peer-level review, exchange and benchmarking at the EU level – was thus seen as the best of both worlds: EU action without steering and control from the top down.

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<sup>74</sup> See Fritz W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 *Journal of Common Market Studies* 4.

<sup>75</sup> See the limits on social policy measures contained in Consolidated Version of the Treaty on the Functioning of the European Union, 2012 OJ C 326/47 (adopted on 13 December 2007, entered into force on 1 December 2009), art 153.

<sup>76</sup> Jonathan Zeitlin, 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?' in Gráinne de Búrca (ed.) *EU Law and the Welfare State: In Search of Solidarity* (Oxford: Oxford University Press, 2005) 213; Gráinne de Búrca, 'The Constitutional Challenge of New Governance in the European Union' (2003) 28 *European Law Review* 6.

<sup>77</sup> Fritz W. Scharpf, 'Legitimate Diversity: The New Challenge of European Integration' in Tanja A. Borzel and Rachel A. Cichowski (eds.), *The State of the European Union, Vol. 6: Law, Politics and Society* (Oxford: Oxford University Press, 2003) 79.

<sup>78</sup> Charles F. Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', in Charles F. Sabel and Jonathan Zeitlin (eds.), *Experimentalist Governance in the European Union* (Oxford: Oxford University Press, 2010) 1; Olivier De Schutter and Simon Deakin, 'Reflexive Governance and the Dilemmas of Social Regulation' in Olivier De Schutter and Simon Deakin (eds.), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Brussels: Brulyant, 2005) 3.

## B. Lessons from the OMC for the UNGP NAP Process

The European Union context in which the OMC has been developed differs significantly from the broader global context in which the UNGPs need to be implemented via National Action Plans. To take some of the key differences, the EU is a highly integrated legal space made up of a group of comparatively homogenous 'Western' liberal nation-states. At the same time, the challenges faced by many non-European states in implementing the UNGPs – most pertinently the fact that oftentimes the most severe human rights violations are committed by Europe-based 'multi-national' corporations operating in so-called developing countries – will be more difficult to address than the social policy challenges managed via the OMC. These differences notwithstanding, the European experience with open coordination can be helpful in improving the global process of implementing the UNGPs via National Action Plans.

The UNGPs' attempt to 'close governance gaps created by globalisation' responds to the necessity of enhanced state cooperation in preventing and redressing corporate human rights abuse under conditions of global interdependency.<sup>79</sup> The ability of states to enforce human rights in relation to businesses incorporated within their jurisdiction increasingly depends on the human rights practise of other states where those businesses may be producing, packaging and trading their goods. Responding to this challenge requires consistent and effective international standards that ensure corporate compliance with human rights wherever they operate. At the same time, the legal and political orders into which the UNGPs must fit, and the state capacity to enforce them, varies considerably between national contexts. As a result, agreement on binding international norms – such as an overarching Treaty regime – has thus far proven difficult to achieve.<sup>80</sup> As the UNWG Guidance puts it, 'while all NAPs share

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<sup>79</sup> Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5 (7 April 2008) para 3.

<sup>80</sup> An early failed attempt in this regard were the 2003 UN Draft Norms that proposed to directly impose international human rights obligations on corporations; see UN Economic and Social Council, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', E/CN.4/Sub.2/2003/12 (26 August 2003). In 2014, the Human Rights Council adopted a resolution establishing a working group tasked with drafting an international human rights and business treaty; Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights', A/HRC/RES/26/9 (14 July 2014).

common ground in their alignment with the UNGPs and with international human rights instruments, ... NAPs and the processes through which they are developed and updated must also adjust to each state's capacity, and cultural and historic contexts'.<sup>81</sup>

Moreover, the UNGP process speaks to the OMC's challenge of managing collective action problems to avoid a 'race to the bottom' in regulatory and human rights standards. Economic globalization places both developed and developing states in a bind.<sup>82</sup> The experience with existing EU member state NAPs suggests that there are currently few incentives for home states of multi-national corporations to create binding extraterritorial standards lest those companies decide to shift capital and jobs elsewhere. Host states' attempt to enhance human rights protection in relation to corporations operating on their territories, by contrast, carries the risk to imperil foreign trade and investment. This enables in particular large corporate groups to free-ride on inter-state competition – a global collective action problem that the UNGPs seek to address by encouraging states to move forward together without unilateral economic self-harm or competitive downward pressure on human rights standards.

It is for reason of these comparable governance challenges that the OMC's experience can provide a number of lessons for successfully managing the tension between interdependency and diversity through the NAP process. Rather unsurprisingly, given the high hopes that greeted its arrival, the OMC in practice rarely lived up to its full promise. A key concern within social science research has been the OMC's effectiveness.<sup>83</sup> The EU's original Lisbon Strategy failed to reach most of its headline targets, with much of the blame falling at the OMC's door.<sup>84</sup> One problem was the OMC's voluntary nature: if member states were to deliver social and economic goals

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<sup>81</sup> See UNWG, note 10, 4.

<sup>82</sup> We are grateful to an anonymous reviewer for this observation.

<sup>83</sup> See, e.g., Martina Eckhardt, 'The Open Method of Coordination on Pensions: an Economic Analysis of its Effects on Pension Reforms' (2005) 15 *Journal of European Social Policy* 247; Martin Lodge, 'Comparing Non-Hierarchical Governance in Action: The Open Method of Coordination in Pensions and Information Society' (2007) 45 *Journal of Common Market Studies* 2; Milena Buchs, *New Governance in European Social Policy: The Open Method of Coordination* (Houndmills, Basingstoke, Hampshire: Palgrave MacMillan: 2007).

<sup>84</sup> See Wim Kok, Chair of the High Level Group, 'Facing the Challenge: The Lisbon Strategy for Growth and Employment' (2004), [https://ec.europa.eu/research/evaluations/pdf/archive/fp6-evidence-base/evaluation\\_studies\\_and\\_reports/evaluation\\_studies\\_and\\_reports\\_2004/the\\_lisbon\\_strategy\\_for\\_growth\\_and\\_employment\\_report\\_from\\_the\\_high\\_level\\_group.pdf](https://ec.europa.eu/research/evaluations/pdf/archive/fp6-evidence-base/evaluation_studies_and_reports/evaluation_studies_and_reports_2004/the_lisbon_strategy_for_growth_and_employment_report_from_the_high_level_group.pdf) (accessed 13 April 2017).



through purely national plans, what was their incentive to be responsive to common EU objectives?<sup>85</sup> It was feared that national reports would merely list programs governments wished to implement anyway. States would follow EU principles they agreed with and disregard those that involved budgetary and political costs. Such a risk also presents itself in relation to the UNGP NAPs – and has already shown signs of realisation in those EU member state NAPs that confine themselves to listing past national achievements.<sup>86</sup> UNGP NAPs, too, are designed as a largely nationally guided process with few explicit incentives (either positive or negative) for governments to respond directly to international norms.

However, the OMC's evolution from these early experiences also illustrates how both positive and negative incentives can be established. While empirical accounts of the first ten years of the OMC's life are relatively sceptical about its ability to induce direct policy change, these accounts are more supportive of 'second order' effects.<sup>87</sup> Second-order effects concern the ability of the OMC to alter the process through which national and EU policy-making is conducted, encouraging policy-making to be more responsive to over-arching substantive goals.

One example is the ability of the OMC to mainstream social goals across government departments and to place social topics on the national agenda.<sup>88</sup> This represents a concern of European policy-makers to this day (and one that finds some mirror in other 'horizontal' EU policy fields, including human rights). The fate of social policy, and its ability to meet positive social targets and outcomes, is likely to depend on policies determined beyond the traditional confines of social and labour ministries. For instance, a key determinant of social policy can be the attitudes of finance ministries, in terms of their willingness either to devote resources to social programmes or to consider the impact of financial and tax measures on inequality. By requiring the government as a

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<sup>85</sup> The UNWG has highlighted a similar problem with regard to the UNGP NAP process: 'The experience of ongoing processes points to the challenges in marrying together dedicated leadership and ownership of national action plans through cross-Government cooperation.' UN General Assembly, note 31, para 13.

<sup>86</sup> See ICAR and ECCJ, note 26.

<sup>87</sup> On the OMC's national effects, see Dawson, note 71, 164–234; Martin Heidenreich and Jonathan Zeitlin, *Changing European Employment and Welfare Regimes: The Influence of the OMC on National Reforms* (London: Routledge, 2009).

<sup>88</sup> Heidenreich and Zeitlin, *ibid*, at 221

whole to produce a common national employment or social inclusion strategy across departments, one goal of the social OMC has been to encourage states to develop cross-departmental governance structures in which social concerns are placed on the agenda of national actors who may otherwise be institutionally oblivious to such goals.

Another such 'second order' effect can consist of improving policy-makers' understanding of the relationship between policies and effects. Designing effective social policies requires understanding the likely impacts of those policies on different groups in society, and the way similar policies have developed in the past. By asking states to measure their social performance, and by developing data streams and statistical indicators (e.g. on inequality or poverty at EU level, the OMC's rationale is also couched in terms of improving states' capacity for evidence-based policy-making.<sup>89</sup> At the same time, the developed indicators and metrics can be used by civil society groups to monitor the social performance of individual states and of the EU as a whole. These examples of 'second-order effects' speak to some elements of the UNWG and ICAR-ECCJ NAP Guidance already taken up by a number of EU member states, such as the emphasis placed on inter-ministerial and cross-departmental cooperation and the importance of including civil society actors into the development and implementation of NAPs.

### **C. Structural Features of the OMC Process**

The ability to induce 'second-order effects' depends on a number of structural features of the OMC process – features that the UNGP NAP process does not yet possess. These include, first, an infrastructure for states to conduct peer review on the performance of other states. In the OMC case, this is normally done within specialized committees, made up of national representatives and EU officials, who assess national plans according to common EU objectives and indicators. Peer review can be seen in terms of both negative and positive inducement. Negatively, peer review allows states to critically assess the performance of their neighbours, particularly in circumstances

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<sup>89</sup> See e.g. the importance of evidence based tools in the 2008 re-launch of the Social Protection and Inclusion OMC. Commission Communication, 'A Renewed Commitment to Social Europe: Re-enforcing the Open Method of Coordination for Social Protection and Social Inclusion', COM (2008) 418 final.



where negative national performance can have externalities on other states.<sup>90</sup> Here, peer review provides a reason (in the absence of 'hard' legal obligations) for national officials to take seriously both the quality of their NAPs and the outcomes that domestic reforms produce over time. Yet peer review is about more than 'negative' shaming: empirical evidence from the OMC in the social policy field suggests that peer review mainly focuses on positive performers.<sup>91</sup> How have neighbouring states managed to successfully tackle endemic problems such as child poverty or long-term unemployment and how can their regulatory approach inform reform efforts elsewhere? Here, peer review exploits the positive aspects of interdependence: that other states are likely to face similar problems and may have innovative solutions to be learned from.<sup>92</sup>

Secondly, part of the OMC's success (as discussed above) has been associated with developing indicators, and improving the information basis through which national policy-makers form their decisions. In the field of social policy, for example, the EU's Social Protection Committee has developed a Social Protection Performance Monitor (SPPM), whose function is to track the performance of EU member states according to different metrics of social performance (e.g., employment, health and material deprivation).<sup>93</sup> Crucially, the function of indicator development is not only cross-national comparison but to allow states to better understand causal relationships between different forms of regulation and social outcomes. What, for example, is the impact of early school-leaving on employment and productivity, or the effect of fiscal transfers to certain vulnerable groups on the poverty rate? The goal in this sense is not a convergence of social policies across states but a better understanding of the capacities and limitations of various policy tools to achieve a given goal. As highlighted in section

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<sup>90</sup> This is a key rationale behind the coordination of national budgets in the European semester – significant economic imbalances could de-stabilize the Eurozone, putting pressure on the financial stability of others; see the explanations in European Commission, 'European Semester: A New Architecture for the New EU Economic Governance – Q&A', MEMO/11/14 (12 January 2011).

<sup>91</sup> Jelle Visser, 'The OMC as Selective Amplifier for National Strategies for Reform' in Jonathan Zeitlin and Philippe Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Brussels: Peter Lang, 2005) 173; Sandra Kroger, *Soft Governance in Hard Politics: European Coordination of Anti-Poverty Policies in France and Germany* (Wiesbaden: VS Verlag, 2008) 44–6.

<sup>92</sup> On learning under the OMC, see Claudio M. Radaelli, 'Europeanization, Policy Learning and New Modes of Governance' (2008) 10 *Journal of Comparative Policy Analysis: Research and Practice* 3.

<sup>93</sup> European Commission, Social Protection Committee, 'Social Protection Performance Monitor (SPPM) – Methodological Report by the Indicators Sub-group of the Social Protection Committee' (17 October 2012), <http://ec.europa.eu/social/BlobServlet?docId=9235&> (accessed 13 April 2017).

three, the issue of indicators and benchmarks is one for which both the NAP guidance and NAP development in the EU member states has thus far shown little interest.

Thirdly, one should reflect on the OMC's failures as well as its successes. A frequently lamented feature of open coordination has been its poor record in terms of participation and transparency.<sup>94</sup> This record has had a bearing not only on the OMC's wider legitimacy but also on its effectiveness. The failure, for example, to include parliaments and regional bodies in the process of establishing national plans under the OMC gave rise to complaints that open coordination suffers from a lack of national and regional ownership, with ambitious goals set at the EU-level often forgotten or disappointed when 'translated' into national action.<sup>95</sup> This is particularly so in certain types of constitutional order: in federal states (e.g., Germany, where lower-levels of governance have strong regulatory powers) or states with strong forms of parliamentary control (e.g., in Scandinavia), government plans without wider institutional input risk being overturned by other bodies later in the policy-making process. The link between poor participatory performance and weak delivery is yet another lesson the OMC may provide for the UNGP NAP process

Providing an appropriate institutional and procedural infrastructure for the OMC has been key to open coordination's successes and limitations. A policy coordination process that relies purely on national reporting, without any inducements to deliver on commitments made or improve performance over time, can easily slip into a box-ticking exercise that is increasingly unresponsive to its initial goals. Similarly, a national strategy without wide domestic buy-in, including from constitutionally significant bodies, cannot expect to deliver wide-ranging reforms. Finally, a process of developing complex national strategies in response to transnational and global challenges is simply a wasted opportunity if no structures exist to compare national performance, to improve collective understanding of evolving shared problems, and to allow states to respond to the practices of their neighbours. Given the many features that the NAP process and

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<sup>94</sup> Milena Büchs, 'How Legitimate is the Open Method of Coordination?' (2008) 46 *Journal of Common Market Studies* 4; Sandra Kröger, 'The End of Democracy as we know it? The Legitimacy Deficits of Bureaucratic Social Policy Governance' (2007) 29 *Journal of European Integration* 5.

<sup>95</sup> See Kok, note 82; Dawson, note 71, 199–206.

the OMC share in common, the lessons learnt from the open coordination's existing history are also of relevance to implementing the UNGPs at the global level.

### III. TOWARDS A EUROPEAN OMC FOR BUSINESS AND HUMAN RIGHTS

#### A. An OMC for Business and Human Rights in the EU Governance Context

The OMC's experience points to some deficiencies of the otherwise highly detailed existing guidance for developing and implementing National Action Plans on business and human rights. The lack of sufficient consideration for indicator development, benchmarking, peer pressure and mutual learning through peer review suggests concerns about the broader sustainability and effectiveness of the NAP process. Some lessons, however, may have more specific relevance to the European Union and the connections between the NAP process and the broader structure of EU governance. The vast majority of currently existing NAPs stem from EU member states. This creates a unique opportunity for developing national measures in a coordinated manner within the European Union. One noticeable aspect of many of the NAPs produced by EU member states is their frequent references, either to EU-wide strategies on CSR, or to EU legislative measures.<sup>96</sup> Moreover, the competence to implement a comprehensive business and human rights strategy is shared between the EU and the member states. As a consequence, the EU has in some areas already developed legislation of its own, raising issues concerning the coherence of EU and national measures and (by the operation of EU competence rules) limiting member states' own powers to set binding standards.<sup>97</sup>

These considerations raise the prospect of developing a European OMC process for business and human rights. The idea of applying the OMC to the realm of EU fundamental rights more broadly is not new.<sup>98</sup> It has, however, faced two key obstacles

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<sup>96</sup> See, e.g., Government Offices of Sweden, note 36, 27; Finnish Ministry of Employment and the Economy, note 38, 16–19.

<sup>97</sup> See European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play', SWD(2015) 144 final (14 July 2015).

<sup>98</sup> See Olivier De Schutter, 'The Implementation of the Charter of Fundamental Rights through the Open Method of Coordination', NYU School of Law, Jean Monnet Working Paper 07/04 (2007) 4, <http://www.jeanmonnetprogram.org/archive/papers/04/040701.rtf> (accessed 13 April 2017); Stijn Smismans, 'How

in the past. First, the legal powers available to the Union to develop an autonomous fundamental rights policy have often been contested and remain unclear.<sup>99</sup> Second, member states have tended to see open coordination processes as a bureaucratic burden, establishing potentially costly and time-consuming implementation structures without clear rewards.<sup>100</sup>

These objections seem less pressing when considering an OMC in the particular field of business and human rights. Regarding the competence-based obstacle, many issues relating to the UNGPs touch upon areas of shared competence. By giving effect to EU legislation on matters such as accounting standards for trans-national corporations or human trafficking, the member states are implementing the UNGPs under the shadow of EU law. The OMC could be used to monitor national implementation of EU laws that carry a business and human rights dimension, ensuring consistency and coherence of these laws throughout the European Union. Some key EU Directives already establish a duty of the European Commission to monitor their national implementation for this very reason.<sup>101</sup> While such a coordination process would lack a distinct legal basis in the EU Treaties, this has not prevented the establishment of OMCs in other policy areas (such as social inclusion), provided open coordination is used as a mechanism to support and complement, rather than entirely harmonise, the laws of the member states.

Secondly, it is questionable whether an OMC on business and human rights would constitute a significant additional bureaucratic burden. The vast majority of member states have produced, or have committed to producing, NAPs on business and human rights and/or CSR. Moreover, the European Commission has already dedicated expertise and resources to organising peer reviews on CSR and human rights. The

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to be Fundamental with Soft Procedures? The OMC and Fundamental Social Rights', in Gráinne de Búrca and Bruno de Witte (eds.), *Social Rights in Europe* (Oxford: Oxford University Press, 2005) 217.

<sup>99</sup> On this historical problem see Philip Alston and J.H.H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in Philip Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999) 2, 22–7.

<sup>100</sup> See, e.g., the resistance to (and temporary abolition of) the social inclusion OMC from 2010–2012, described in Mary Daly and Paul Copeland, 'Poverty and Social Policy in Europe 2020: Ungovernable and Ungoverned' (2014) 42:3 *Policy and Politics* (2014) 351.

<sup>101</sup> See the duty contained in EU accounting directives for the Commission to review national implementation prior to 2018; see Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, OJ L 182/19 (26 June 2013).

European Council's Working Group on Human Rights (COHOM) also monitors the national implementation of the UNGPs as part of its work on implementing the EU's Strategic Framework on Human Rights and Democracy.<sup>102</sup> While a wider OMC on human rights may struggle to politically convince, a more focused procedure, building on the UNGP process, could create synergies with existing institutions.

## **B. The Role and Added Value of an OMC for Business and Human Rights**

What would be the role and added value of an explicit OMC process? First, an OMC on Business and Human Rights could contribute to avoiding duplication, overlap and inconsistency in the implementation of different business and human rights processes at EU and member state level. By establishing a forum of institutionalized cooperation between national and EU actors in which divergent approaches to business and human rights can be monitored and addressed, an OMC process could be a central vehicle in delivering policy coherence across the European Union.

Second, an OMC process could act as a means of identifying where further EU action to implement the UNGP may be necessary. While some reforms necessary to implement the UNGPs can be delivered via purely national action, a coordinated European approach may be more effective in addressing those business and human rights challenges with a strong cross-border element. To take one example currently under discussion – accounting rules for financial and labour practice disclosure for large companies – EU rules in this area are likely to have far greater influence in encouraging corporations to disclose information about human rights-related standards than domestic regulation (which may be perceived as creating incentives for corporations to re-locate to other EU member states with less intrusive standards).<sup>103</sup> By providing a comparative overview of how EU member states are implementing the UNGPs, an

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<sup>102</sup> See European Commission, note 93, 8.

<sup>103</sup> This is a long-standing issue in EU human rights law – that regulatory competition between EU member states could lead to a race to the bottom in social or other standards, demanding EU intervention that sets 'minimum' base-line rules for inter-state competition; see Simon Deakin, 'Regulatory Competition after Laval' (2007–8) 10 *Cambridge Yearbook of European Legal Studies* 581.

OMC process could allow actors at the European and national level to identify the potential and limitations of future EU action on business and human rights.<sup>104</sup>

Third, the OMC could act as an incentive structure for member states to deliver on the content of their NAPs. Depending on the design of the process, an OMC procedure would set-out specific timetables and feedback mechanisms for NAPs on business and human rights. Timetabling would encourage states to make actionable commitments through specific deadlines (a concern mirrored in the lack of ‘SMART’ measures in current NAPs), exerting particular pressure on those states that have repeatedly promised NAPs but failed to deliver them. Feedback mechanisms, such as peer reviews, would also allow member states to nudge each other into following prior commitments outlined in the NAPs.<sup>105</sup> Furthermore, the OMC’s history indicates some evidence of open coordination facilitating rights of ‘structural entry’ for NGOs and civil society actors in national strategies, potentially building a coalition of national actors to encourage governments to deliver NAP promises.<sup>106</sup>

Fourth, the OMC could act as a space for mutual learning and the exchange of good practices between EU member states.<sup>107</sup> Those peer reviews that have been conducted on member states’ CSR strategies demonstrate the usefulness of peer review in understanding common challenges (such as regulating business and human rights in times of austerity) and identifying emerging strategies to meet these challenges.<sup>108</sup> A peer review process for business and human rights was considered by the European Commission in its 2011 CSR Strategy, but not followed-up in a systematic manner, in spite of some indications of member state support.<sup>109</sup> As discussed in the previous section, the purpose of such peer would be to identify innovative strategies to meet

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<sup>104</sup> On this argument in relation to a broader OMC in fundamental rights, see De Schutter, note 94.

<sup>105</sup> A 2013 UK-based peer review of national CSR strategies offers some examples of critical scrutiny by government officials concerning plans of other States; see European Commission, ‘Peer Review Report: Peer Review on Corporate Social Responsibility’ (18 June 2013), [ec.europa.eu/social/BlobServlet?docId=11471&langId=en](http://ec.europa.eu/social/BlobServlet?docId=11471&langId=en) (accessed 13 April 2017).

<sup>106</sup> See Dawson, note 71, 192–5; K. Jacobsson, ‘Trying to Reform the “Best Pupils in the Class”? The Open Method of Coordination in Sweden and Denmark’, in Zeitlin and Pochet (eds.), note 87, 107.

<sup>107</sup> This is one of the goals highlighted in the EU’s 2011 CSR strategy, see European Commission, note 8.

<sup>108</sup> See European Commission, note 103.

<sup>109</sup> See European Commission, note 93, 34.



shared problems, using the diversity of national implementation strategies regarding the UNGPs as an experimental advantage from which the EU as a whole may benefit.

### C. Designing an OMC for Business and Human Rights

How would an OMC on business and human rights look in practice? As discussed above, the history of the OMC suggests that there is no 'one size fits all' model.<sup>110</sup> In this sense, the very advantage of an open coordination process is that it need not fit within existing legal categories but can be shaped to meet the preferences and needs of the actors involved. Some core minimum requirements, however, are likely to be:

- Establishing a common time-table for the production and revision of NAPs as part of a bi-annual or tri-annual cycle;
- Tasking a specific institution (e.g., a committee of national representatives within the Commission or Council) with overseeing the NAP process and conducting state-to-state peer review;
- Building up qualitative and quantitative indicators to allow the comparative benchmarking or indexing of national performance on business and human rights (including *via* existing indicator systems for CSR built by other international organisations);<sup>111</sup>
- Facilitating civil society involvement, both at the EU level (e.g., *via* the EU's multi-stakeholder platform on CSR) and at the national level (e.g., through incorporating into EU peer review an indicator concerning national civil society participation in the development and review of NAPs);
- Establishing mechanisms connecting the NAP process with the EU's ongoing CSR strategy (to ensure that those responsible for designing EU initiatives in the field of

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<sup>110</sup> See Brigid Laffan and Colin Shaw, 'Classifying and Mapping OMC in Different Policy Areas', NEW-GOV Working Paper (2005) 2.

<sup>111</sup> See, e.g., the UN Development Programme's (UNDP's) methodology for CSR country-level assessment, see Magdalena Kostulska, 'UNDP Develops New Measurement Tools for Corporate Social Responsibility' (2011), <https://business.un.org/en/documents/9472> (accessed 13 April 2017). See also Global Reporting Initiative, 'GRI Standards', <https://www.globalreporting.org/standards> (accessed 13 April 2017); International Organization for Standardization, 'ISO 26000 Social Responsibility', <http://www.iso.org/iso/home/standards/iso26000.htm> (accessed 13 April 2017).

business and human rights are included in the monitoring and peer-review process).

The schema above provides only a first sketch of what an OMC process for business and human rights might look like. One should not over-estimate its potential – as much as the OMC's history in the social policy field provides lessons, these are never entirely generalizable to other policy fields. Any OMC in the business and human rights field ought to be adapted significantly to this area's distinctive features. Given the *potential* benefits of such a process, however, an OMC for business and human rights ought to be seriously considered. It may provide new impetus to the UNGP's implementation, to which so much current academic and institutional attention is directed.<sup>112</sup>

#### IV. CONCLUSION

Whether in the EU or elsewhere, implementing the UNGPs has not proven an easy task. Some may even doubt whether the development of National Action Plans – supported by something like the OMC or not – is the right approach to taking business and human rights forward. An alternative would be a stronger focus on 'hard' law reform. Within the European Union, the recent FRA opinion considers the possibility of further harmonising member state legislation to improve access to justice for victims of corporate-related human rights violations.<sup>113</sup> At the global level, an allegiance of states from the Global South and international NGOs are pushing for the development of an international business and human rights treaty.<sup>114</sup> Many stakeholders in the Global North, including the European Union, have voiced concerns that the international treaty initiative may undermine the consensus built around the UNGPs and distract resources from their further implementation.<sup>115</sup> Inversely, developing an OMC on business and human rights could be seen as sidelining the principal goal of international legal reform.

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<sup>112</sup> See Thielbörger and Ackermann, note 3.

<sup>113</sup> See EU Fundamental Rights Agency, note 13, 24–53.

<sup>114</sup> See Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/Res/26/9 (14 July 2014).

<sup>115</sup> European Union, Submission to the First Session of the Intergovernmental Working Group (6-10 July 2015), <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx>. (accessed 13 April 2017).



Meanwhile, there is an increasing recognition on both sides of the debate that ‘hard’ and ‘soft’ law approaches can play a complementary role in preventing and redressing corporate-related human rights violations. In this vein, the recent FRA opinion combines recommendations on legal reform with an emphasis on ‘softer’ policy instruments to coordinate and pool national initiatives on business and human rights. This speaks to a long-standing discussion over the OMC in other contexts. While some have opposed the OMC as frustrating the goals of European legal integration, others have praised it as a means of building trust and cooperation at the transnational level in policy fields where hard law solutions initially faced obstacles and suspicion.<sup>116</sup> An OMC on business and human rights should be appraised in these latter terms. Institutionalising structures of cooperation and exchange between states in developing and implementing NAPs does not reduce the space for hard law; instead, it helps to identify common challenges and best practices that can serve as a foundation for developing a more ambitious European and international legal framework.

Seen in this light, the recent FRA recommendation to develop an OMC on business and human rights offers a unique opportunity for the EU to act as a forerunner in international efforts to make the NAP process a success. In doing so, the EU should pay attention to the lessons learnt from open coordination in other policy fields. An OMC can act as a powerful incentive structure and engine of change, but only if it is overseen by a responsible central institution and supported by relevant indicators and benchmarks, and if it ensures the participation of the full range of actors at the national level ultimately responsible for translating international norms into concrete action.

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<sup>116</sup> See, e.g., Kerstin Jacobsson and Åsa Vifell, ‘Integration by Deliberation? On the Role of Committees in the Open Method of Coordination’, in Erik O. Eriksen, Christian Joerges and Jürgen Neyer (eds.) *European Governance, Deliberation and the Quest for Democratisation* (Oslo: Arena, 2003) 411.